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BEFORE THE ARIZONA CORPORATION COMMISSION

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2 WILLIAM A. MUNDELL  
CHAIRMAN  
3 JIM IRVIN  
COMMISSIONER  
4 MARC SPITZER  
COMMISSIONER  
5

AZ CORP COMMISSION  
DOCUMENT CONTROL

6 IN THE MATTER OF THE APPLICATION OF  
7 THE ARIZONA ELECTRIC DIVISION OF  
8 CITIZENS COMMUNICATIONS COMPANY TO  
9 CHANGE THE CURRENT PURCHASED POWER  
10 AND FUEL ADJUSTMENT CLAUSE RATE, TO  
11 ESTABLISH A NEW PURCHASED POWER AND  
12 FUEL ADJUSTMENT CLAUSE BANK, AND TO  
13 REQUEST APPROVED GUIDELINES FOR THE  
14 RECOVERY OF COSTS INCURRED IN  
15 CONNECTION WITH ENERGY RISK  
16 MANAGEMENT INITIATIVES.

DOCKET NO. E-01032C-00-0751

Arizona Corporation Commission

DOCKETED

AUG 23 2002

DOCKETED BY *CAH*  
AMENDED

PROCEDURAL ORDER

12 **BY THE COMMISSION:**

13 On September 28, 2000, the Arizona Electric Division ("AED") of Citizens Communications  
14 Company ("Citizens") filed with the Arizona Corporation Commission ("Commission") an  
15 application to change the current purchased power and fuel adjustment clause rate ("PPFAC"), to  
16 establish a new PPFAC bank, and to begin accruing carrying charges and to request approved  
17 guidelines for the recovery of costs incurred in connection with energy risk management initiatives  
18 ("Application").

19 By Procedural Order issued April 18, 2002, the law firm of Gallagher & Kennedy was  
20 disqualified from representing Citizens in this matter. Citizens was directed file an appearance of  
21 substitute counsel as soon as practicable.

22 On May 2, 2002, the law firm of Brown & Bain, P.A. ("Brown & Bain") entered an  
23 appearance as counsel on behalf of Citizens.

24 On May 9, 2002, Mohave and Santa Cruz Counties ("Counties") filed an Objection to Notice  
25 of Appearance of Substitute Counsel. On May 14, 2002, Staff filed a Joinder in the Counties'  
26 objection to Brown & Bain's representation. On May 22, 2002, the Residential Utility Consumer  
27 Office ("RUCO") filed a joinder in the Counties' opposition to Brown & Bain's appearance as  
28 counsel for Citizens in this case.

1 On May 22, 2002, Brown & Bain filed a Reply in Support of Its Notice of Appearance of  
2 Substitute Counsel.

3 Responses were filed on May 29, 2002 by the Counties, Staff, and RUCO.

4 On June 3, 2002, Brown & Bain filed a Surreply in Support of its Notice of Appearance of  
5 Substitute Counsel.

6 Pursuant to Procedural Order issued June 11, 2002, an oral argument was conducted on July  
7 2, 2002.

8 On July 16, 2002, a Procedural Order was issued disqualifying Joseph Mais and Brian Lake  
9 from the law firm of Brown & Bain from further representation of Citizens in this proceeding.  
10 However, other attorneys in the Brown & Bain firm who did not participate in rendering advice to  
11 Citizens regarding the purchase power dispute with Arizona Public Service Company ("APS") were  
12 not disqualified. The Procedural Order stated that objections should be filed by July 23, 2002 and, if  
13 no action was taken by the Commission by July 30, 2002, any such objection would be deemed  
14 denied.

15 On July 22, 2002, Citizens filed Objections to the Procedural Order and requested that the  
16 Commission overturn the disqualification of Mr. Mais. The Commission took no action regarding  
17 Citizens' Objections by July 30, 2002. On July 31, 2002, Citizens filed a Motion for  
18 Reconsideration.

19 On August 21, 2002, the Commission conducted a Special Open Meeting regarding the  
20 Motion for Reconsideration. At the Open Meeting, the Commission passed an Amendment revising  
21 the Procedural Order and disqualifying the entire law firm of Brown & Bain from representing  
22 Citizens in this case. The Amendment passed by the Commission is incorporated into this Amended  
23 Procedural Order.

#### 24 **Opposition to Brown & Bain's Representation**

25 The Counties contend that, because attorneys from Brown & Bain previously provided legal  
26 advice to Citizens with respect to its purchase power dispute with APS, the entire Brown & Bain firm  
27 should be disqualified. According to the Counties, Joseph Mais and any other Brown & Bain  
28 attorney who provided advice to Citizens regarding the purchase power dispute are potential

1 witnesses in this proceeding because Citizens previously waived the attorney-client privilege  
2 regarding that dispute. The Counties claim that Rule 42, Rules of the Arizona Supreme Court  
3 (Ethical Rule "ER" 3.7), prevents an attorney from appearing as an advocate in a proceeding in which  
4 the attorney is likely to be a necessary witness. ER 3.7 provides as follows:

5  
6 (a) A lawyer shall not act as advocate at a trial in which the lawyer  
is likely to be a necessary witness except where:

- 7 (1) the testimony relates to an uncontested issue;  
8 (2) the testimony relates to the nature and value of legal  
services rendered in the case; or  
9 (3) disqualification of the lawyer would work substantial  
hardship on the client.

10 (b) A lawyer may act as an advocate in a trial in which another  
11 lawyer in the lawyer's firm is likely to be called as a witness  
unless precluded from doing so by ER 1.7<sup>1</sup> or ER 1.9<sup>2</sup>.

12 The Counties assert that the comments to ER 3.7 support their opposition to Brown & Bain's  
13 continued representation. The comments indicate that because a witness must testify on the basis of  
14 personal knowledge, while an advocate is expected to explain evidence given by others, it may not be  
15 clear if an advocate-witness is offering proof or an analysis of the proof. The Counties cite  
16 *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99 (1981), for the proposition that a  
17 lawyer should not be permitted to represent a client in a case where he may also be called as a  
18 witness. In *Cottonwood*, the Arizona Supreme Court upheld the trial court's decision to disqualify  
19 the defendant's attorney in a breach of contract case, where the plaintiff intended to call the  
20 defendant's attorney as a witness due to his personal knowledge regarding the defendant's assets and  
21 liabilities. The Counties claim that, although *Cottonwood* was decided prior to implementation of the  
22 current Rules of Professional Conduct, a subsequent case decided after enactment of the current Rules  
23 cited *Cottonwood* with approval. See, *Sellers v. Superior Court*, 154 Ariz. 289 (1987).

24  
25 <sup>1</sup> ER 1.7(a) prohibits a lawyer from representing a client if that representation is directly adverse to another client, unless  
26 the lawyer reasonably believes the representation will not be adverse and both clients consent to the representation. ER  
27 1.7(b) provides that a lawyer may not represent a client if the representation may be materially limited by the lawyer's  
responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably  
believes the representation will not be adversely affected and the client consents after consultation.

28 <sup>2</sup> ER 1.9 provides that a lawyer who previously represented a client is prohibited from representing another person in the  
same or substantially related matter in which that person's interests are materially adverse to the interests of the former  
client, unless the former client consents.

1           The Counties also cite *Security General Life Ins. Co. v. Superior Court*, 149 Ariz. 332 (1986)  
2 as supporting precedent. In *Security General*, the Arizona Supreme Court established a two-part  
3 criteria for establishing whether an attorney is a *necessary* witness pursuant to ER 3.7. The Court  
4 held that the proposed testimony must be relevant and material, and that the testimony must be  
5 unobtainable elsewhere. *Id.* at 335. The Counties argue that both prongs of the *Security General*  
6 case are met here because the purchase power dispute is a material issue in this case, and because  
7 Brown & Bain attorneys are the only persons who can provide underlying information regarding the  
8 assumptions they made, the analysis they undertook, and the advice they rendered.

9           The Counties also argue that the representation by a different Brown & Bain attorney (other  
10 than those who offered legal advice on the purchase power dispute) is not permissible. The Counties  
11 acknowledge that ER 3.7(b) permits representation by another member of the firm that will not  
12 appear as a witness, as long as such representation will not result in a conflict of interest or  
13 compromise the interests of a former client. However, the Counties contend that continued  
14 representation by the firm will create an unacceptable dilemma for an attorney who may be forced to  
15 choose between zealously representing his client or defending the testimony of his partner.

16           Finally, the Counties claim that Brown & Bain's disqualification will not cause a substantial  
17 hardship for Citizens. The Counties assert that because there are no current deadlines in place, and no  
18 hearing date has been set, Citizens will not be prejudiced by having to select new counsel at this stage  
19 of the proceeding.

20           Staff agrees with the Counties' opposition to Brown & Bain's representation in this  
21 proceeding. Staff claims that the testimony and pleadings submitted in this case make it clear that  
22 Mr. Mais is a potential witness due to Citizens' waiver of the attorney-client privilege. Staff argues  
23 that Mr. Mais is not a witness just as to tangential facts but was involved, by Citizens' prior  
24 admission, in rendering advice regarding state law claims and the possibility and timing of initiating a  
25 lawsuit against APS. Staff concludes that, at a minimum, the Brown & Bain attorneys that gave legal  
26 advice regarding the purchase power dispute should be disqualified.

27           RUCO claims that it cannot take a position on disqualification until the Commission  
28 investigates and examines Mr. Mais under oath regarding his advice on the purchase power dispute.

1 RUCO suggests that a preliminary hearing should be conducted to determine whether Citizens'  
2 communications with Mr. Mais contradict Company witness Flynn's pre-filed testimony.

3 **Citizens' Response to the Request for Disqualification**

4 Citizens contends that the proponents of disqualification bear a heavy burden to prove that the  
5 criteria set forth in ER 3.7 have been met. Citizens claims first that, contrary to the opposing parties'  
6 arguments, Mr. Mais is not a witness in this case because he was not noticed as a witness prior to the  
7 previously established March 13, 2002 deadline for filing testimony. In addition, Citizens asserts that  
8 no other party appeared interested in the testimony of Brown & Bain's attorneys until after the firm  
9 entered an appearance on behalf of Citizens. Citizens argues that this disinterest in Brown & Bain's  
10 prior legal advice shows that the opposing parties have contrived a conflict of interest to trigger  
11 disqualification.

12 Citizens also argues that Mr. Mais is not a *necessary* witness under ER 3.7. Citizens contends  
13 that the opposing parties' arguments fail to meet the criteria described in the *Security General* case  
14 because Mr. Mais' testimony is neither material nor unobtainable elsewhere. Citizens argues that  
15 Brown & Bain's previous legal advice was limited to rendering an opinion on the practical likelihood  
16 of getting prompt attention from an Arizona state or federal court, if the Company were to file a civil  
17 lawsuit against APS. Thus, according to Citizens, Brown & Bain's earlier legal advice is tangential  
18 to the issues pending before the Commission in this proceeding. Citizens also contends that there are  
19 numerous sources of the identical evidence regarding Brown & Bain's earlier legal advice. Citizens  
20 asserts that the advice given by Mr. Mais is reflected in contemporaneous documents and the  
21 testimony of Mr. Flynn. As a result, Citizens argues that the incremental value of probing the  
22 underlying assumptions of Brown & Bain's advice is too remote to warrant imposing the penalty of  
23 denying Citizens its chosen counsel. As an alternative, Citizens offered that the co-author of the  
24 April 26, 2001 memorandum to Mr. Flynn (Brian Lake) could be called to testify regarding Brown &  
25 Bain's prior legal advice to Citizens.

26 The final argument raised by Citizens is that two of the exceptions to ER 3.7(a) apply in this  
27 case. Citizens claims that there is no "contested issue" at stake because Brown & Bain's earlier legal  
28 advice was limited to describing procedural aspects of Arizona state and federal litigation. Citizens

1 also asserts that the opposing parties have understated the “hardship” that would be imposed by  
2 disqualifying Brown & Bain. Citizens contends that it would be deprived of its trusted, longstanding  
3 counsel, and that it would be difficult to find representation in this complex case because most large  
4 firms in Arizona would likely have some sort of conflict due to representation of Pinnacle West and  
5 its subsidiary companies, including APS.

6 **Discussion and Conclusion**

7 As stated in the April 18, 2002 Procedural Order issued in this case, “[t]he disqualification of  
8 an attorney or a firm from a proceeding is not a matter that the Commission takes lightly.” The prior  
9 Procedural Order expressed concerns with avoiding “the perception of impropriety” and with  
10 ensuring that all parties are afforded “full due process.” In order to protect the integrity of the  
11 Commission’s process, the Procedural Order disqualified Citizens’ prior counsel in this case because  
12 one of the firm’s founding members served on the Board of Directors of Pinnacle West and APS at  
13 the time that Citizens was embroiled in a dispute with those companies regarding interpretation of the  
14 prior purchased power agreement.

15 Brown & Bain’s representation of Citizens in this matter does not raise the same type of  
16 public policy concerns stated in the prior Procedural Order. However, the firm’s representation raises  
17 a different issue that requires interpretation of the Arizona Supreme Court’s rules, specifically ER 3.7  
18 which addresses situations where a lawyer is required to appear as a witness.

19 **The Necessary Witness Standard**

20 As stated above, with certain exceptions ER 3.7 generally precludes a lawyer from  
21 representing a client at trial when the lawyer “is likely to be a necessary witness.” Since Mr. Mais is  
22 apparently the only Brown & Bain attorney who rendered advice regarding the purchase power issue  
23 and is also representing Citizens in this proceeding, the threshold question that must be answered is  
24 whether Mr. Mais is a necessary witness in this case. The *Security General* case was cited by both  
25 sides of the dispute in support of their respective positions on this issue. As described above, the  
26 *Security General* definition of *necessity* requires that the proposed testimony must be “relevant and  
27 material” and that it must be “unobtainable elsewhere.”

28 With respect to whether Mr. Mais’ testimony would be relevant and material, the decision by

1 Citizens whether to pursue litigation against APS is an issue in this case and Citizens, having waived  
2 the attorney-client privilege with respect to that issue, has opened up for litigation in this case the  
3 reasonableness of the legal advice given. As such, testimony by attorneys from Brown & Bain  
4 regarding legal advice given on the purchase power dispute would be relevant and material in this  
5 proceeding.

6 The more difficult question is whether the information that would be provided by Mr. Mais'  
7 testimony is "unobtainable elsewhere." In the *Security General* case, the Arizona Supreme Court  
8 determined that the plaintiff failed to show that the defendant attorney's testimony could not be  
9 obtained from other witnesses. *Security General* at 335. The Court found that the defendant's  
10 attorney, who had previously served as Director of the Arizona Departments of Insurance and  
11 Administration, had no personal knowledge regarding either the plaintiff or the defendant attorney's  
12 client that was unobtainable "from a host of departmental employees, past and present." *Id.*  
13 Accordingly, the Court vacated the trial court's disqualification of the defendant's law firm.

14 The facts presented in this case are significantly different. Here, although Citizens has  
15 presented the testimony of another firm's attorney regarding Brown & Bain's advice, as well as a  
16 memorandum prepared by Brown & Bain, Brown & Bain attorneys are the only persons who can  
17 provide underlying information regarding the legal advice they rendered on the purchase power  
18 litigation issue. Unlike the situation in *Security General*, where the plaintiff was attempting to elicit  
19 general expert opinion testimony from the defendant's counsel because of that attorney's employment  
20 background, in this case the Counties and Staff seek factual testimony regarding the basis of the legal  
21 advice given to Citizens. Citizens, having waived the attorney-client privilege with respect to that  
22 legal advice, should not now be heard to complain (subject to the exceptions discussed below) that  
23 the attorneys who gave the advice are off-limits to discovery and cross-examination. Because the  
24 underlying basis of the advice given by the Brown & Bain attorneys is not obtainable from any other  
25 source, the second prong of the *Security General* test is also met.

26 *Exceptions to the Necessary Witness Standard*

27 The next question to be considered is whether any of the ER 3.7(a) exceptions apply.  
28 Although Citizens contends any testimony by Brown & Bain lawyers would relate to an "uncontested

1 issue,” thereby invoking the ER 3.7(a)(1) exception, the issue of advice given regarding whether to  
2 litigate the purchase power dispute with APS is a contested issue in this case. Therefore, despite  
3 Citizens’ claim that Brown & Bain gave only limited procedural advice on that issue, the firm’s  
4 advice was not given regarding an uncontested issue. The exception in ER 3.7(a)(2), which relates to  
5 testimony regarding attorney fees, is clearly not relevant here.

6 The most subjective of the exceptions is ER 3.7(a)(3), which is invoked if disqualification  
7 would cause a “substantial hardship on the client.” The Comments regarding this section indicate  
8 that “a balancing is required between the interests of the client and those of the opposing party” and  
9 that, in assessing hardship, “due regard must be given to the effect of disqualification on the lawyer’s  
10 client.” However, the Comments also state that “[I]t is relevant that one or both parties could  
11 *reasonably foresee that the lawyer would probably be a witness* (emphasis added).”

12 In this case, Citizens has alleged hardship to the extent that it will be deprived of its trusted  
13 counsel, the difficulty of Citizens finding acceptable replacement counsel, and due to additional  
14 delays in the case that will cause the Company to incur carrying charges associated with the PPFAC  
15 costs. However, the Company’s alleged hardship must be balanced against the need for opposing  
16 counsel to probe the reasonableness of the advice given by the Brown & Bain attorneys, as well as the  
17 integrity of the Commission’s process.

18 As indicated in the Comments to ER 3.7 cited above, another factor that must be considered is  
19 whether both sides could or should have reasonably foreseen that the Brown & Bain attorneys who  
20 gave advice on the purchase power dispute were likely to be witnesses. Citizens’ decision not to  
21 pursue litigation against APS regarding the purchase power dispute was placed at issue in this case  
22 many months ago. Indeed, the Company’s legal strategy to waive the attorney-client privilege  
23 regarding that decision was directed at countering the opposing parties’ claims that the issue should  
24 have been litigated. Thus, it should not have come as a surprise to Citizens that the opposing parties  
25 would seek to conduct discovery on, and perhaps cross-examine, all of the attorneys who rendered  
26 legal advice regarding the purchase power dispute litigation strategy. Weighing all of these factors,  
27 the potential hardship to Citizens is not sufficient to overcome the need to afford all parties the ability  
28 to fully examine the underlying basis for the legal advice rendered regarding the Company’s litigation

1 strategy against APS.

2 Pursuant to ER 3.7(a), and based on the information in the record as it currently exists, Mr.  
3 Mais and Mr. Lake are disqualified from representing Citizens in this proceeding due to the  
4 likelihood that one or both of those individuals may be necessary witnesses<sup>3</sup>.

5 *Disqualification of Entire Firm*

6 The final issue to be considered is whether the entire firm of Brown & Bain should be  
7 disqualified. As described above, ER 3.7(b) permits a lawyer to act as an advocate in a trial in which  
8 another lawyer in the same firm is likely to be a witness, unless prohibited from doing so due to a  
9 conflict of interest (ER 1.7) or where the interests of a former client would be compromised (ER 1.9).  
10 The Counties argue that the entire firm should be disqualified because the remaining attorneys in the  
11 firm could face the dilemma of having to decide whether to defend the client's interests or those of  
12 another member of the firm. At the oral argument, Staff indicated that it is opposed only to continued  
13 representation by attorneys for Brown & Bain who were involved in rendering advice regarding the  
14 purchase power dispute with APS.

15 This case will impact the interests of thousands of Arizona ratepayers not parties to the  
16 proceeding. Affected ratepayers must be assured as to the transparency and propriety of this  
17 Commission's deliberations, and our scrutiny of an alleged conflict of interest is broader than would  
18 be applied to a non-government adversary proceeding. Brown & Bain's representation raises an issue  
19 regarding the public perception of this Commission's deliberative process. We find that the  
20 Counties' arguments for disqualification of the entire firm have merit and are persuasive. The  
21 Counties point out that an inherent conflict may arise as a result of Brown & Bain's continued  
22 representation because the firm's remaining non-witness attorneys would face a dilemma between  
23 representing the client's interests and the interests of the firm. The potential for "divided loyalties" is  
24 simply too great in the event that factual evidence presented at the hearing raises a conflict that  
25 requires counsel to choose between the client's interests and those of a partner in his firm. Such a  
26 possible conflict during the course of the hearing means the Commission could be faced with

27 \_\_\_\_\_  
28 <sup>3</sup> Since Mr. Lake has not entered an appearance in this case, the disqualification technically applies at this time only to Mr. Mais.

1 resolving this same issue again at a later date, thereby imposing additional hardship on the parties and  
 2 causing further delay in this proceeding. Accordingly, the law firm of Brown & Bain shall be  
 3 disqualified from representing Citizens in this proceeding.

4 IT IS THEREFORE ORDERED that the law firm of Brown & Bain is disqualified from  
 5 representing Citizens in this proceeding.

6 IT IS FURTHER ORDERED that Citizens shall file in this docket as soon as is practical the  
 7 appearance of substitute counsel as well as an indication of when Citizens will be prepared to proceed  
 8 in this matter. After substitute counsel has entered an appearance, a Procedural Order will be issued  
 9 scheduling a Procedural Conference for purposes of discussing discovery deadlines, timelines for  
 10 filing supplemental testimony, and other relevant procedural matters<sup>4</sup>.

11 DATED this 23<sup>rd</sup> day of August, 2002.

12  
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14 \_\_\_\_\_  
 15 DWIGHT D. NODES  
 16 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

17 Copies of the foregoing mailed/delivered  
 18 this 23<sup>rd</sup> day of August, 2002 to:

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28 <sup>4</sup> On August 21, 2002, the law firm of Chiefetz & Iannitelli, P.C., entered an appearance on behalf of Citizens. Concurrently, the New York law firm of Huber, Lawrence & A bell filed an Application to Appear *Pro Hac Vice* on behalf of Citizens in this case. At the conclusion of the August 21, 2002 Special Open Meeting, a brief Procedural Conference was conducted. The parties were directed by the Administrative Law Judge to report back by August 26, 2002 with proposed dates for concluding discovery, filing supplemental testimony, and for commencement of the hearing in this matter.

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